Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978
No.

79-184

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

-against-

ROLAND N. KARLEN, ET AL.,

Respondents.

Brief in Opposition

PETITION DENYING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX


| | Page |
|---|---|
| Table of authorities..... | (i) |
| Opinions below..... | 2 |
| Jurisdiction..... | 2-3 |
| Question presented..... | 3 |
| Statute involved..... | 3-4 |
| Statement of the case..... | 4 |
| Reasons for denying the petition..... | |
| 1. THE SECOND CIRCUIT'S RULING INVALIDATING THE AGENCY'S DECISION WAS FULLY IN ACCORD WITH ITS STATUTORY POWERS OF REVIEW..... | 6 |
| 2. THE DETERMINATION OF THE SECOND CIRCUIT IS FULLY IN ACCORD WITH THE RECENT CASES DECIDED BY THIS COURT..... | 25 |
| 3. THE DECISION OF THE SECOND CIRCUIT IS IN ACCORD WITH DECISIONS OF OTHER CIRCUITS..... | 37 |
| Conclusion..... | 45 |

## TABLE OF CASES AND AUTHORITIES


| | Page |
|---|---|
| Aberdeen & Rockfish Railroad Company v. SCRAP, 442 U.S. 289 (1975)..... | 25,28 |
| Appalachian Mountain Club v. Brinegar, 394 F.Supp. 105 (N.H.D.C. 1975)..... | 44 |
| Camp v. Pitts, 411 U.S. 138 (1973)..... | 36 |
| Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)..... | 27,28 |
| City of Des Plaines v. Metropolitan Sanitary District, 552 F.2d 736 (7th Cir. 1977)..... | 37,42 |
| City of New York v. United States, 337 F.Supp. 150 (E.D.N.Y. 1972)..... | 41 |
| Consolo v. Federal Maritime Commission, 383 U.S. 606 (1966)..... | 26 |
| Culpeper League for Environmental Protection v. United States Nuclear Regulatory Commission, 574 F.2d 633 (D.C. Cir. (1978)..... | 37,44 |

Page

Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973)..... 43

Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972)..... 43

Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021 (4th Cir. 1975)..... 23-24

Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972)..... 21,41

Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973)..... 40,41

Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978)..... 2,6,14, 16,17,23, 24,33,35

Kleppe v. Sierra Club, 427 U.S. 390 (1976).....25,28,33

McDowell v. Schlesinger, 404 F.Supp. 221 (W.D.Mo. 1975)..... 21

Matsumoto v. Brinegar, 568 F.2d 1289 (9th Cir. 1978)..... 37,44

Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976)..... 43

Page

Nucleus of Chicago Homeowners Association v. Lynn, 524 F.2d 225 (7th Cir. 1975)..... 37,39

Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973)..... 21,32

SEC v. Chenery Corp., 317 U.S. 80 (1943)..... 36

Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975)..... 43

Silva v. Romney, 473 F.2d 287 (1st Cir. 1973)..... 21

Trinity Episcopal School Corp. v. Harris, 445 F.Supp. 204 (S.D.N.Y. 1978)..... 2,12,14, 34,36

Trinity Episcopal School Corp. v. Romney, 387 F.Supp. 1044 (S.D.N.Y. 1974)..... 2,10,18, 20

Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 (2d Cir. 1975)..... 2,10,11, 13,14,17, 31,32,39-40,43

Page

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)..... 25,26 28,36

Statutes and regulations:

Act of August 9, 1975, Pub. L. No. 94-83, 89 Stat. 424..... 11

Administrative Procedure Act, 5 U.S.C. 706(2)(A)..... 6,7,16, 27

Fair Housing Act, 42 U.S.C. 3608 et. seq.:..... 7,31

42 U.S.C. 3608(d)(5)..... 30-31

Housing and Community Development Act of 1977, 42 U.S.C. 1437 et. seq.:

42 U.S.C. 1437f(c)(1)..... 20

National Environmental Policy Act, 42 U.S.C. 4331 et. seq.:. 16

Section 102(2)(C), 42 U.S.C. 4332(2)(C)..... 12

Section 102(2)(D), 42 U.S.C. 4332(2)(D)..... 11

Section 102(2)(E), 42 U.S.C. 4332(2)(E)..... 3,4,11, 17,30

| | Page |
|---|---|
| United States Housing Act of 1937, 42 U.S.C. 1437 et. seq.:..... | 31 |
| 40 C.F.R. 1500 et. seq..... | 15,17 |

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No.

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PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

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-against-

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Respondents,

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PETITION DENYING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Demov, Morris, Levin & Shein, on behalf of Roland N. Karlen, et al., submits that the petition for the writ of certiorari be denied and that the judgment of the United States Court of Appeals for the Second Circuit in this case be affirmed.

## OPINIONS BELOW

The decision of the Court of Appeals (HUD's petition, App. A, 1a-11a) is reported at 590 F.2d 39. The decision of the district court (id., App. B, 12a-48a) is reported at 445 F. Supp. 204. The earlier opinion of the Court of Appeals (id., App. C, 49a-62a) is reported at 523 F.2d 88. The earlier opinion of the district court (id., App. D, 63a-141a) is reported at 387 F. Supp. 1044.

## JURISDICTION

The judgment of the Court of Appeals (HUD's petition, App. E, 142a-143a) was entered on December 14, 1978, and a petition for rehearing was denied on March 15, 1979 (id., App. F, 144a-145a). On June 5, 1979, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and

including July 13, 1979, and on July 5, 1979, Mr. Justice Marshall further extended the time for filing a petition to and including August 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

When a federal agency's consideration of alternatives in its decision-making process contains insufficient data on which to base a rational decision, does a reviewing court have the right to indicate that the agency decision was arbitrary and capricious.

## STATUTORY PROVISION INVOLVED

Section 102(2)(E) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(E), provides:

> "The Congress authorizes and directs that, to the fullest extent possible: *** (2) all agencies of the Federal Government shall -
>
> * * *

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources ***

STATEMENT OF THE CASE

The petitioners seek a writ of certiorari to review the determination of the United States Court of Appeals for the Second Circuit on the narrow ground that it substituted its judgment for that of the agency by concluding that the Secretary of Housing and Urban Development ("HUD") had not complied with the National Environmental Policy Act ("NEPA") when HUD determined that more low-income housing should be added to the West Side Urban Renewal Area ("WSURA"). It is argued that the Second Circuit misconstrued NEPA and that its decision conflicts with prior determinations of this Court and those of other

circuits. For the purposes of analyzing this narrow issue, the Statement of the Case contained in the petition of the three district court defendants, although factually erroneous in many respects, misleading in some of their conclusions, and incomplete as a Statement of the Case, can be accepted without the necessity of a further statement in this response. It should be noted that the reviewing agency itself (HUD) is also one of the litigants in this case; consequently, its views cannot be accepted as those of a separate and independent governmental adjudicatory body.

Facts relevant to the argument will be discussed in the legal analysis to follow.

## REASONS FOR DENYING THE PETITION

### 1. The Second Circuit's Ruling Invalidating The Agency's Decision Was Fully In Accord With Its Statutory Powers Of Review.

Petitioner's characterization of the Second Circuit's determination as invalidating "the agency's decision because it disagreed not with the procedures followed by HUD in reaching its decision but with the decision itself" is erroneous (HUD's petition, 13). The Second Circuit's decision found HUD's position to be "arbitrary, capricious [and] an abuse of discretion..." as authorized by the Administrative Procedure Act ("APA") (5 U.S.C. 706(2)(A)) Karlen v. Harris, 590 F.2d 39, 43 (2d Cir. 1978). The opinion of the Second Circuit is devoted largely to a discussion of the internal inconsistencies, contradictions, and omissions contained in the

HUD report. There is no substitution of judgment by the court for HUD's conclusions; there is only a remand to the agency for reconsideration in light of the court's opinion of the factors required by NEPA to be evaluated by HUD in light of the requirements of the West Side Urban Renewal Plan ("Plan") and the Fair Housing Act, 42 U.S.C. 3608 et. seq. (id. at 44-45).

HUD has conceded in its petition that the arbitrary and capricious doctrine of the APA governs in stating:

> "However, because NEPA contains no special provision for judicial review, the Secretary's substantive decision could be set aside only if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. 706(2)(A)" (HUD's petition, 13).

The petition then states categorically that "the Secretary's decision was not arbitrary, capricious or an abuse of

discretion" (id.) and offers in support three observations about: (1) the consequences of "delay;" (2) the shortage of decent housing in the WSURA; and (3) the proposal for low-income units to be built on Site 30 it is claimed amounts to only 2 percent of all housing units in the WSURA (id. at 13-14).

These observations ignore the basic thrust of the Second Circuit's opinion. The significant point in the instant case is that the Second Circuit is dealing only with a determination that the agency's report is "arbitrary and capricious" within the meaning of the APA and not with any fundamental interpretation of a federal statute which would merit this Court's review. In essence, petitioners do not agree with the Second Circuit's opinion that the agency's report is "arbitrary and

capricious;" they have attempted to elevate this factual disagreement into a basic issue of statutory interpretation, in an attempt to create an issue which would justify this Court to take jurisdiction.

No such fundamental issue exists.

In order to comprehend fully the Second Circuit's decision, it is necessary to explain the relevant prior history of this case -- a recital petitioners omitted from their petitions.

When the proposal for the conversion of Site 30 from middle to low-income housing occurred in December, 1972, HUD prepared a Negative Impact Statement which concluded that the project had no environmental significance, requiring no environmental clearance. This finding was challenged by plaintiff, and although HUD's finding

was affirmed by the district court, Trinity Episcopal School Corp. v. Romney, 387 F.Supp. 1044, 1079 (S.D.N.Y. 1974), it was subsequently reversed by the Second Circuit (Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 [2d Cir. 1975]) and remanded with instructions that the agency prepare a report in compliance with NEPA since the project did have a significant environmental impact. In so holding, the Second Circuit specified the procedural requirements of NEPA to be considered:

"We believe that HUD failed to comply with the mandate of §102 (2)(D) of the Act and that the compliance therewith is a prerequisite to any further federal actions on the Site 30 project." (id. at 92-93).1

The agency, nevertheless, proceeded to prepare a Special Environmental Clearance under §102(2)(C) instead of a study of alternatives under §102(2)(D) (later changed to §102(2)(E)) as mandated

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1 42 U.S.C. §4332(2) provides as follows:

" (2) All agencies of the Federal Government shall....(E) study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources...." (42 U.S.C. 4332 (2)(E)).

The Court of Appeal's opinion refers to Section 102 (2)(D). In August 1975, two weeks after the Court's decision, Section 102(D) was redesignated as Section 102 (2)(E) of the Act, 42 U.S.C. 4332(2)(E). See Act of August 9, 1975 Pub.L.No. 94-83, 89 Stat. 424.

by the Second Circuit.[2] The Special Environmental Clearance filed in April, 1977 (almost two years later), was 200 pages long, 191 pages of which were devoted to environmental factors totally irrelevant to the issues involved and about which there was no dispute. Only 9 pages were devoted to an incomplete discussion of alternatives under §102 (2)(C) (R. 67-75). However, this discussion did not comply with the Second Circuit's mandate to study alternatives

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2 Counsel for plaintiff wrote to HUD calling its attention to the error it was making, but its warning was rebuffed by both the agency, a party to the action, and the district judge. Claimants' request for a conference or a hearing to assist in the preparation of a proper report was also refused. Trinity Episcopal School Corp. v. Harris, 445 F.Supp. 204, 219 (S.D.N.Y. 1978); R. 261-66, 588-97. References are to pages of the printed record before the Second Circuit Court of Appeals.

when there are unresolved conflicts concerning alternative uses of available resources under §102(2)(E).[3] Even HUD concedes this in stating that "the only NEPA requirement at issue in the present case is §102(2)(E)" (HUD's petition,

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3 This report was prepared exclusively by the three defendants in this case and was based upon their effort to support their position in this litigation. This fact, although previously surmised, was later confirmed by plaintiffs as a result of the institution of proceedings under the Freedom of Information Act (R. 309-50). The proceeding to obtain this information was strongly resisted by the defendants who insisted on preparing the report in secret. Meanwhile, repeated requests by plaintiffs to be heard at a conference or a due process hearing were refused, again defying the Second Circuit's statement that "[i]f attention is paid to the Plan and its purposes, the agencies with the cooperation of the interested parties should be able to arrive at an equitable solution." Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 95; R. 225-28, 239-42, 265-66, 290-91, 304-50, 595.

12). Over plaintiffs' objection, the district court affirmed HUD's action a second time. Trinity Episcopal School Corp. v. Harris, supra, 445 F.Supp. at 204.[4] Again the Second Circuit reversed:

> "[W]e reinstate the injunction against the construction of a low-income apartment on Site 30 and remand to the district court for further consideration in light of this opinion." Karlen v. Harris, 590 F.2d, supra, at 45 (1978).[5]

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4 When plaintiffs' counsel pointed out on argument that HUD's report was prepared under the wrong section, the district judge violently castigated counsel for not calling the error to his attention, whereupon counsel showed the judge a copy of a letter doing exactly that (R. 225-42, 254-308, 344-46, 577-622). In its opinion, the district court nonetheless criticized counsel. 445 F.Supp. at 219; R. 225-42, 577-622.

5 Although the title of the case on the first appeal was Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 88 and Karlen v. Harris, supra, 590 F.2d at 39, on the second appeal, the cases are the same.

The Second Circuit did not substitute its judgment for that of the agency as petitioners incorrectly state. Rather, the court remanded the matter for compliance with the requirements of NEPA; the gravamen of its decision was that HUD was arbitrary and capricious in its analysis by failing to evaluate the elements required by NEPA, the CEQ, its own regulations,[6] and the mandate of

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6 HUD was required by its own regulations and by the Legislation as well to consider a variety of alternatives such as: alternative locations or sites; alternatives of not building; alternative designs both in use of site and in size of individual units and in number of total units; dispersal of the low-income units on more sites in the project area; alternative measures for compensating or mitigating environmental impacts; and alternatives requiring action of a significantly different nature which would provide similar benefits with different impacts such as rehabilitation of existing buildings in the WSURA as public housing projects. See e.g., 40 CFR §1500, et. seq.

the Second Circuit on the first appeal. This determination was made by the Second Circuit precisely within the scope of the reviewing power accorded to it by statute. The Second Circuit said:

> "In seeking the scope of our reviewing powers we must look to the Congressional source, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321, et seq. and the Administrative Procedure Act (APA), 5 U.S.C. §706(2)(A) (1976) which provides in part:
>
> 'The reviewing court shall --
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." Karlen v. Harris, supra, 590 F.2d at 43.

Pursuant to these "reviewing powers," the Second Circuit analyzed the HUD report and ascertained that HUD not only had disregarded elements its own

regulations required it to consider (see note 6, supra), but had also contradicted the statements contained in its own report. Karlen v. Harris, supra, 590 F.2d at 42-44. In Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 88 (the first appeal), the Second Circuit held that HUD had failed to consider reasonable alternatives under Section 102(2)(E) (id.at 95), and suggested a variety of alternatives HUD was expected to consider in order to comply with NEPA and its own regulations (id. at 94). In Karlen v. Harris, 590 F.2d at 42, 43 and 44 (the second appeal), the Second Circuit reaffirmed its decision on the first appeal and held additionally that the mandates of its first decision had not been followed (id. at 39). Moreover, the Second Circuit found that the most important

deficiency of the HUD report was its failure to interpret the facts within the framework of the Plan, the goal of which was to renew the area as an economically balanced and integrated neighborhood (id. at 41; Trinity Episcopal School Corp. v. Romney, supra, 387 F.Supp. at 1085). It was upon these elements that the Second Circuit found, within the scope of its "reviewing powers," that the agency action was arbitrary and capricious.

The reasons offered by HUD for its recommended action border on the frivolous when weighed against the significant omissions and contradictions contained in its Report as eluciated in the Second Circuit's opinion on the second appeal.

The HUD petition, 13-14, offers three factual basis for its contention that the Second Circuit substituted its

judgment for that of the agency: (1) there is a shortage of decent housing for families with low-income in the WSURA; (2) adding additional low-income units to the WSURA would be de minimus; and (3) delay.

It will be established that these items, covered in the opinions of the Second Circuit on both the first and second appeals, do not justify the conclusion that the court was wrong in setting aside the agency report.

First, there is no shortage of decent housing in the WSURA. During the more than twenty years the Plan has been in planning and execution, deteriorated or deteriorating housing in the WSURA has been replaced or rehabilitated except for buildings originally slated for demolition but later occupied illegally and forceably possessed by

squatters whose continued occupancy has been condoned by the petitioners. Trinity Episcopal School Corp. v. Romney, supra, 387 F.Supp. at 1056; R. 181-82, 257-58.

Second, the de minimus argument is incorrect in that 160 units of low-income public housing for families in a high-rise building (which is now barred by the Housing and Community Development Act of 1977 unless exceptional circumstances are shown, 42 U.S.C. 1437f (c)(1))[7] can tip an area already im-

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7 "Notwithstanding any other provision of this section, after October 12, 1977, the Secretary shall prohibit high-rise elevator projects for families with children unless there is no practical alternative." 42 U.S.C. 1437f(c)(1).

pacted with low-income housing into a segregated ghetto. This is particularly so where there is already an overconcentration of low-income housing. (R. 237, 268, 355-57). See Otero v. New York City Housing Authority, 484 F.2d 1122, 1133-34 (2d Cir. 1973). It is within NEPA's environmental purview to consider such an increase in low-income housing and to determine the environmental impact of that increase:

> "NEPA's aims clearly extend beyond problems and effects of sewage and garbage disposal and air and water pollution to 'include protection of the quality of life for city residents.' Noise, traffic, congestion, overburdened mass transportation systems, crime, and congestion all affect the environment." McDowell v. Schlesinger, 404 F.Supp. 221, 246 (W.D.Mo. 1975). See Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972); Silva v. Romney, 473 F.2d 287 (1st Cir. 1973).

Thus, the infusion of an additional 160 units of high-rise low-income housing for families into a site already con-

taining 80 percent low-income housing will exacerbate a situation ripe for crime, vandalism, etc. into a serious environmental hazard (R. 182, 206, 235-36, 353-55, 359-62, 382). Such a result is scarcely de minimus.

Third, petitioners misconstrue the decision below in its analysis of delay as a factor in rejecting alternative proposals. The Second Circuit (emphasizing that it is dealing with a situation having a major environmental impact now and for a long time into the future) has indicated that a two year delay in arriving at a sound resolution of the situation is justified. In its report, HUD concluded that delay was the most convincing reason for not building on alternative sites even though the alternative sites were environmentally superior. The Second Circuit has held

that while delay is quite properly a factor for HUD to consider in its report, it is not sufficient to override other social and environmental concerns that Congress, "in authorizing federal aid in creating HUD itself," expected all agencies to consider when complying with NEPA. Karlen v. Harris, supra, 590 F.2d at 44; R. 69.

Petitioners' reliance on Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021 (4th Cir. 1975) is unsound. In Fayetteville, delay was only one of several factors the agency considered in determining that one alternative to its proposal need not be discussed by it in its report. The court concluded that the suggested alternative's "numerous disadvantages as weighed against its one advantage... coupled with a four-year delay" (emphasis

added; id. at 1028) required no discussion in its environmental impact statement. In Fayetteville, delay was only one minor factor; in the instant case, delay became the linchpin in overriding other concededly superior alternatives to building low-income housing on Site 30. Karlen v. Harris, supra, 590 F.2d at 44.

Thus, this case involves no fundamental question justifying a review by this Court; all it involves is a factual issue of whether the Second Circuit correctly remanded the matter on the ground that HUD's actions were arbitrary, capricious, and an abuse of discretion as determined by the Second Circuit.

2. The Determination Of The Second Circuit Is Fully In Accord With The Recent Cases Decided By This Court.

In an attempt to elevate their disagreement with the conclusions contained in the Second Circuit's opinion in this case, petitioners improperly rely on some of the language used by this Court in three cases in which it reversed remands by lower courts to administrative agencies where the NEPA statute was involved, viz: Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); Kleppe v. Sierra Club, 427 U.S. 390 (1976); Aberdeen & Rockfish Railroad Company v. SCRAP, 422 U.S. 289 (1975).

The quotation in HUD's petition, 11, that NEPA's "mandate to the agencies is essentially procedural," citing Vermont Yankee, supra, 435 U.S. at 558, seems

to indicate that the power of the courts to review such action is "procedural" only. However, an examination of the very case quoted indicates that this Court also stated: "Administrative decisions should be set aside ... only for substantial procedural or substantive reasons as mandated by statute, Consolo v. FMC, 383 U.S. 607, 620 (1966) ... ." Vermont Yankee, supra, 435 U.S. at 558.

Indeed, in the three cited cases, this Court evaluated the lower court determinations on the merits and found them to be incorrect; it did not reverse solely on the basis that they were "substantive" determinations and hence, erroneous, as petitioners would seem to imply. In actuality, the reviewing power of the courts in NEPA cases is

both procedural and substantive, but the latter only on a limited basis under the APA, i.e., the "arbitrary and capricious" standard used by the Second Circuit in this case.

This Court has upheld a court's review of the merits of an agency's determination in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). The pertinent part of Overton states:

> "Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) [of the APA] requires the finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... .' To make this finding the Court must consider whether the decision made was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (id. at 416).

In Overton (which is cited in Vermont Yankee, supra, 435 U.S. at 549, n.21), this Court held that the Secretary of Transportation had failed to comply with the directives of Section 4(f) of the Department of Transportation Act and Section 138 of the Federal-Aid Highway Act by not considering viable alternatives in developing a highway through a park. In its brief, HUD candidly admits that in such a situation, the court must review the substance of an agency's decision to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (HUD's petition, 13). This is precisely what the Second Circuit did in this case; there is nothing in Vermont Yankee, Kleppe, or Aberdeen to the contrary. In those cases, this Court held that the lower courts had erred in

the evaluation they made of the agencies' determinations and reversed. But these reversals were on the merits of the lower courts' actions and not because the decisions were "substantive" instead of "procedural" as petitioners would have us believe.

However, even if the Second Circuit's determination were to be evaulated factually, it is clear that its finding that the agency's action was arbitrary and capricious is fully justified.

HUD's principal argument for stating that its findings were not arbitrary, capricious or an abuse of discretion is that, because there is such a shortage of low-income housing in the WSURA and because it is the federal agency's responsibility to supply low-income people with adequate housing, it has properly used its discretion in

determining the need for more low-income housing in the WSURA. In so stating, however, HUD ignores two very key factors which were the basis for the Second Circuit's remanding of the matter for HUD's further consideration.

The first is HUD's failure to comply with Section 102(2)(E) of NEPA as we have shown in "1" above.

The second is its failure to consider the principal intention and goal of the W st Side Urban Renewal Plan as it is required to do under the 1968 Fair Housing Act which provides that "(d) The Secretary of Housing and Urban Development shall... (5)administer the programs and activities relating to housing and urban development in a manner affirmatively to further the

policies of this subchapter." 42 U.S.C. 3608(d)(5).[8] This cannot be accomplished unless all viable alternatives for housing are adequately considered by HUD as enunciated in the first Circuit Court decision, Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 88, and largely ignored by HUD in its report.

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8 HUD cites the United States Housing Act of 1937, 42 U.S.C. 1437 et. seq.; (HUD's petition, 2-3) to show that it has a statutory duty to assist local governments in providing safe and sanitary dwellings for families with low-incomes. For this reason, HUD argues that it has complied with the mandates of NEPA (id., 13). In so doing, however, HUD has forgotten that it must also comply with the Fair Housing Act, 42 U.S.C. 3608, the purpose of which is to provide families with fair housing throughout the United States. One of the key elements of this Act is the need for HUD to consider the impact of integration in the sale, rental and financing of any dwelling. In the instant case, HUD must consider how the WSURA can best be integrated in accordance with both the Fair Housing Act and the Plan.

The goal of the Plan is "integration -- not concentration" (Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 94), and its objectives are to accommodate the housing needs of residents of all income levels which will create an integrated community, balanced racially and economically. This can only be accomplished by following the pro-integration purpose of the Plan -- a purpose HUD would defeat if the change in the Plan is sanctioned by the court. In essence, HUD is required to consider the impact of proposed public housing programs on the racial and economic concentration in the WSURA in which the proposed low-income housing is to be built, an action it has failed to do. See Otero v. New York City Housing Authority, supra, 484 F.2d at 1133. The agency did not

produce "an exhaustive report, identifying and investigating every environmental consequence, weighing every alternative, and discussing the relative advantages and disadvantages of the proposed federal action" as asserted in the HUD petition, 12. Instead, the Second Circuit's opinion documents very specifically (Karlen v. Harris, supra, 590 F.2d at 42-44) HUD's departures from the relevant statute and regulations, thus warranting its decision that the HUD Report is arbitrary and capricious and remanding the case for further consideration.

In Kleppe v. Sierra Club, supra, 427 U.S. at 390, which HUD cites for the proposition that a federal agency need only give a "hard look" to the environmental consequences of its decisions, the court is to determine whether the

agency had some rational basis for reaching its substantive decision. As HUD states in its petition, when "an agency gives little or no weight at all to environmental values or when it rejects an environmentally preferable alternative for no apparent reason, its decision might be arbitrary and capricious." (HUD's petition, 15, note 16). This is exactly what HUD has done in its inadequate consideration of alternatives for low-income housing in the WSURA and it is for this very reason that the Second Circuit held that HUD did not comply with the statutory mandates. HUD concluded, for example, that there were at least two sites which were even more appropriate for the additional low-income housing units planned for Site 30. Trinity Episcopal School Corp. v. Harris, supra, 445 F.Supp. at 215-

16; R. 68-69. Yet HUD failed to explain why it chose to rubber-stamp the City's choices for low-income housing which did not, in its own view, represent the most appropriate alternative. Karlen v. Harris, supra, 590 F.2d at 44; R. 69.

HUD is not being asked to consider remote and speculative alternatives to low-income housing, but rather, it is being required to examine what constitutes a reasonable range of alternatives in the WSURA. What is reasonable depends on the nature and dimensions of the project itself. In the present case, the issue is not merely the building of low-income housing, but rather the economic, social, and ethnic integration of the WSURA as a whole. When an agency such as HUD admits that alternatives were not adequately addressed as it did in this instance

(Trinity Episcopal School Corp. v. Harris, supra, 445 F. Supp. at 215-16), it is incumbent upon the court to remand the case for further consideration.

As recently as last year this Court has reiterated that a reviewing court has the power to remand an arbitrary and capricious agency decision in saying:

> "We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideraton.' Camp v. Pitts, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). See also SEC v. Chenery Corp., 317 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943)." Vermont Yankee Nuclear Power v. Natural Resources Defense Council, supra, 435 U.S. at 549.

### 3. The Decision Of The Second Circuit Is In Accord With Decisions Of Other Circuits.

The district and circuit court cases petitioners cite to support their contention that the Second Circuit substituted its judgment for that of HUD are inapposite and, in fact, support our contention that a reviewing court can reject an agency's determination when it is arbitrary, capricious, or an abuse of discretion, e.g., Nucleus of Chicago Homeowners Association v. Lynn, 524 F.2d 225 (7th Cir. 1975); City of Des Plaines v. Metropolitan Sanitary District, 552 F.2d 736 (7th Cir. 1977); Matsumoto v. Brinegar, 568 F.2d 1289 (9th Cir. 1978); Culpeper League for Environmental Protection v. United States Nuclear Regulatory Commission, 574 F.2d 633 (D.C. Cir. 1978).

Each of these cases cited by petitioners (and indeed all other cases dealing with this subject) is governed by the standard discussed in "2" above. The reviewing power of the courts in NEPA cases is procedural, but substantive issues can be addressed in a review of procedural compliance with the APA standards. Thus, cases decided under these principles go both ways depending on the factual situation encountered. In no event, however, can it be argued that HUD's disagreement with the Second Circuit's decision constitutes a national basis for concluding that a fundamental principle of law was violated, thereby justifying this Court's assumption of jurisdiction, since here HUD is not acting in its capacity as an independent, adjudicatory agency, but rather as a party-litigant.

This principle is implicit in Nucleus where the Seventh Circuit recognized that its standard of review was substantive in that HUD would be required to file an Environmental Impact Statement ("EIS") if its decision were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 524 F.2d at 229. On the merits, however, the court held that the agency action was not arbitrary and capricious and consequently required no remand. In the instant case, the Second Circuit held that the survey made and the conclusion reached by HUD was arbitrary and capricious. Thus, there is no inconsistency in doctrine between the two cases--only a difference in facts. It should be noted, too, that in Nucleus, the Seventh Circuit cited Trinity (the first appeal in this case)

and Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973), the facts of which resemble those in the instant litigation more closely than those in Nucleus. In Nucleus, NEPA was improperly sought as an aid to segregation -- in this case it is used, properly, as an enforcement tool of the nation's policies of integration.

In Jones, the First Circuit held that HUD was required to comply with NEPA with respect to an area urban renewal project by filing an EIS. Jones v. Lynn, supra, 477 F.2d at 891-92. The court considered the complexity of the urban renewal plan and stated that "preservation of the integrity of NEPA necessitates that the [agency] be required to follow the steps set forth in [§4332], even if it...seems likely that those steps will lead it to adhere to

the present result." Id. at 892. See City of New York v. United States, 337 F.Supp. 150, 160 (E.D.N.Y. 1972); see also, Hanley v. Mitchell, supra, 460 F.2d at 648.

The Plan to develop the WSURA is complex, requiring that HUD consider all reasonable alternatives, including those that will fulfill the goal of integration contemplated by the Plan and the Fair Housing Act and not just those goals of the United States Housing Act on which HUD so heavily relies (HUD's petition, 13-14, 17). The First Circuit in Jones emphasized that alternatives HUD considered "irrelevant, trivial, or prohibitively expensive" had to be considered to maintain the fact-finding process mandated by NEPA. Jones v. Lynn, supra, 477 F.2d at 891-92.

In City of Des Plaines, the Seventh Circuit held once again that an agency's determination is reviewable on the merits (i.e., substantively) if its decision is arbitrary or capricious. 552 F.2d at 737. The court held that the Environmental Protection Agency ("EPA") had met the good faith requirement by fully and fairly considering the environmental consequences in its EIS. It determined that even though the EPA had failed to specify standards for bacterial and viral aeration, its EIS contained a fair statement of the problem and the solutions intended, insofar as it was possible to do so. Id. at 739.

In the instant case, however, HUD failed to meet this good faith requirement of NEPA as spelled out in a number of cases, viz: Citizens To Preserve Overton Park v. Volpe, supra, 401 U.S. at 402

(1971); Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1299 (8th Cir. 1976); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 295 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973); Sierra Club v. Morton, 510 F.2d 813, 820 (5th Cir. 1975). In this case, the matter was remanded because HUD failed to demonstrate "how within the framework of the Plan its objective of economic integration can best be achieved with the minimum of adverse environmental impact." Trinity Episcopal School Corp. v. Romney, supra, 523 F.2d at 94. Thus, again, there is only a difference in facts between Des Plaines and this case; there is no difference in the legal principles upon which both cases are grounded. The

same, of course, may be said about Matsumoto, Culpeper and any other properly decided case selected at random from the host of decisions on this issue.

HUD's record in the instant case is fraught with inconsistencies and omissions which the Second Circuit specified in its opinion and which amply justified its conclusion that HUD's report was arbitrary, capricious, and an abuse of discretion. HUD cannot arbitrarily consider the United States Housing Act without weighing the purpose of the Plan and the Fair Housing Act in complying with NEPA. Otherwise, NEPA would become a "paper tiger" behind which the statutory duties of HUD could be shunted. Appalachian Mountain Club v. Brinegar, 394 F.Supp. 105,113 (N.H.D.C. 1975).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York

Respectfully submitted,

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